Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

YVONNE ELLEN, Personal Representative of the Estate of Lynette Franco, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA, Federal Aviation Administration,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether agency manuals, handbooks, and orders promulgated under agency regulations are evidence of the standard of care or merely evidence of agency custom and practice in an action for negligence under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*?

2. Whether the United States bears the burden of proving the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C § 2680(a), applies?

PARTIES TO THE PROCEEDINGS BELOW

The following were parties before the United States Court of Appeals for the Ninth Circuit: Yvonne Ellen (Appellant) and the United States of America (Appellee).

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The decision of the court of appeals affirming the district court (App. 1a-9a) is not reported, but may be found at 2002 U.S. App. LEXIS 3012 (9th Cir. Feb. 22, 2002). The order of the district court (App. 10a-25a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2002. The court of appeals denied a petition for rehearing en banc on May 7, 2002. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this case, 28 U.S.C. § 2680, appears in the appendix to this petition. (App. 30a-32a).

STATEMENT OF THE CASE

This is an action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346 and 2671, and arises from a fatal aircraft accident on February 19, 1996. Yvonne Ellen, the mother and personal representative of the estate of a twenty-four year old passenger, filed suit in the United States District Court for the Southern District of California for negligence on the part of the employees of the Federal Aviation Administration (FAA) in failing to install a required emergency video map that would have allowed air traffic controllers to provide emergency assistance to a pilot who could not see the mountainous terrain, in issuing a series of vectors that placed the aircraft in the midst of dangerous downdrafts, and in failing to provide maximum assistance to a pilot in an

emergency created in part by the actions of the air traffic controllers themselves.

The United States was permitted to late-file a motion to dismiss the claims regarding the emergency obstruction video map (EOVM) as barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a). The district court granted the motion, holding that the decision not to install the equipment was discretionary, even though agency regulations provide that such maps "shall" be in place at facilities providing radar coverage in mountainous terrain and such facilities "shall" consider various alternatives to accommodate the emergency map.

Specifically, the FAA began to implement the EOVM in the late 1970s, as a result of accidents where pilots in instrument meteorological conditions were unable to maintain altitude. The purpose of the EOVM was to aid aircraft in this type of emergency, a particularly dangerous scenario in mountainous terrain. By 1980, the installation and use of EOVM at such terminal radar facilities was a "requirement."

The FAA's Facility Operation and Administration Handbook imposed a requirement in Section 3-103 that "[a]n EOVM shall be established at all terminal radar facilities that have radar coverage in designated mountainous areas and an available channel in their video mappers." Moreover, the Handbook provided that "[a]lternatives . . . shall be considered when necessary to accommodate the EOVM." No EOVM was established here, ostensibly because there was no "available channel." An EOVM was installed after this accident, however.

After six days of trial testimony, the district court orally issued findings of fact and conclusions of law,

finding no employee of the United States to be negligent. As it relates to this petition, the district court found that, even though one of the controllers failed to give a low altitude alert as required by the FAA Air Traffic Control Handbook, this was not a breach of duty by the controller because the pilot was "being alerted in as plain as terms can be . . . about the altitude of the plane." Post-trial motions were filed and denied, and Ellen appealed to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit concurred that the failure to follow the FAA Manual was not a breach of legal duty. The court held that, "while the language of several cases may suggest that Air Traffic Controllers are required to comply with the terms of the Handbook, *Spaulding v. [United States]*, 455 F.2d 222, 226 (9th Cir. 1972)]; *Armstrong v. United States*, 756 F.2d 1407 (9th Cir. 1985), for purposes of tort liability, the Handbook merely provides evidence of the services the FAA assumes and of the ATC practices." (5a).

The Ninth Circuit also affirmed the discretionary function dismissal, concluding the "mandatory language" of an applicable FAA order "[b]y implication, . . . includes the discretion not to install an EOVM when doing so would be undesirable." (3a). The Ninth Circuit further concluded that "[t]he decision not to install an EOVM was also a policy decision" because it involved safety considerations. (4a).

REASONS FOR GRANTING THE WRIT

The safety of the skies has been a paramount national concern over the last year. The need for government employees to enforce and follow mandatory procedures and policies, and the dire consequences of the

failure to do so, became glaringly and alarmingly apparent last September.

Consideration by the Court is warranted because the Ninth Circuit's decision directly conflicts with longstanding precedent by the United States Courts of Appeals for the First, Second, Third, Fifth, Seventh, and Eleventh Circuits, in *Delta Air Lines, Inc. v. United States*, 561 F.2d 381 (1st Cir. 1977); *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967); *Rodriguez v. United States*, 823 F.2d 735 (3d Cir. 1987); *Gill v. United States*, 429 F.2d 1072 (5th Cir. 1970); *Davis v. United States*, 824 F.2d 549 (7th Cir. 1987); *Daley v. United States*, 792 F.2d 1081 (11th Cir. 1986); and *Worthington v. United States*, 21 F.3d 399 (11th Cir. 1986). These circuits all hold that the Air Traffic Control Manual is a source of the controller's legal duties, and is not merely evidence of agency custom or practice.

The Court's decisions teach that government activity is not insulated from liability where there is a failure to follow a mandatory policy. *See Berkovitz v. United States*, 486 U.S. 521 (1988); *United States v. Varig Airlines*, 467 U.S. 797 (1984); *Dalehite v. United States*, 346 U.S. 15 (1953). This case presents a case of first impression regarding burden of proof and a video map required to be used across the country at terminal radar facilities in mountainous terrain to prevent the very kind of accident that took the life of Ellen's daughter. The Ninth Circuit did not hold the United States to its burden of showing the discretionary function applied, confusing safety considerations under an established governmental policy with the balancing of competing considerations in order to establish policy. The United States' failure to follow an established policy is not subject to sovereign immunity.

I. THE NINTH CIRCUIT'S HOLDING REGARDING THE AIR TRAFFIC CONTROL MANUAL DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The Ninth Circuit's decision directly conflicts with its own precedent. *See Armstrong v. United States*, 756 F.2d 1407, 1409 (9th Cir. 1985); *Spaulding v. United States*, 455 F.2d 222, 226 (9th Cir. 1972). Moreover, the Ninth Circuit's decision is directly at odds with reported decisions from other circuits, which recognize the binding nature of the FAA manuals upon the controllers who use them. *See Davis v. United States*, 824 F.2d at 550 (following *Spaulding*); *Rodriguez v. United States*, 823 F.2d at 740 ("[t]he air traffic controller's duties are set forth in the Air Traffic Control Handbook"); *Daley v. United States*, 792 F.2d at 1085 ("the precise nature of the assistance which . . . the controllers owed . . . was required by the provisions of the United States' own Air Traffic Control Manual"); *Delta Air Lines v. United States*, 561 F.2d at 390 ("a substantial and unjustified failure to follow procedures made mandatory by the Manual is persuasive as an indication of a lack of due care"); *Gill v. United States*, 429 F.2d at 1075 ("The government's duty to provide services with due care may rest either upon the requirements of procedures manuals spelling out the functions of its air traffic controllers or upon general pilot reliance on the government for a given service"); *Ingham v. Eastern Air Lines*, 373 F.2d at 233-36 (upholding district court's finding of government negligence when controller failed to follow command in manual). Finally, the Ninth Circuit's decision also is at odds with the Federal Aviation Regulations. *See* 14 C.F.R. § 65.45(a) ("An air traffic control tower operator *shall* perform his duties in accordance with . . . the

procedures and practices prescribed in air traffic control manuals of the FAA . . . .") (emphasis supplied).

The Ninth Circuit's decision in this case is not reported; however, it is available on LEXIS. Ninth Circuit Rule 36-3 only prevents the decision from being "cited to [the Ninth Circuit] or by any other Court in this circuit." 9th Cir. R. 36-3(b). There is nothing to prevent this case from being cited elsewhere as a retreat from the rule first announced by the Ninth Circuit in *Spaulding* and adopted by the federal circuits across the country.

This is a matter of overriding national concern in that "*Spaulding v. United States*, 455 F.2d 222 (9th Cir. 1972), has become an influential, oft-cited case in the area of airplane tort cases . . . [and] . . . [t]he language from *Spaulding* is very instructive . . . in establishing the duty of care FAA officials owe to pilots . . . ." *Davis v. United States*, 824 F.2d at 550. Other circuits cite *Spaulding* for the proposition that the duty of care arises from the FAA manuals. *E.g., id.*; *Delta Air Lines*, 561 F.2d at 389.

The duties of care owed by air traffic controllers in the National Airspace System to pilots and their passengers -- regardless whether a controller is in San Diego or Anchorage or Philadelphia or New Orleans -- are found in the Air Traffic Control Manuals. By holding otherwise, the Ninth Circuit's retreat from its own precedent directly conflicts with long-established case law in other jurisdictions.

Consistency and adherence to established precedent are absolutely necessary to ensure the integrity of the system of *stare decisis*. Selective abandonment of clearly established holdings and legal tests undermines the value of precedent and weakens the integrity of the entire judicial system. Review by the Court is merited.

II. THE COURT SHOULD DECIDE AN ISSUE OF FIRST IMPRESSION REGARDING THE LIABLITY OF THE UNITED STATES UNDER THE FEDERAL TORT CLAIMS ACT.

In *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992), the Ninth Circuit adopted the Sixth Circuit's rule in *Carlyle v. United States*, 674 F.2d 554 (6th Cir. 1982), that the United States has the ultimate burden of proving the applicability of any specific provision of 28 U.S.C. § 2680 containing exceptions to the general waiver of sovereign immunity. The Court has not spoken on the question of burden of proof with respect to the 2680(a) exception. However, neither the district court nor the Ninth Circuit compelled the United States to make a particularized and fact-specific showing, instead requiring Ellen to disprove the applicability of the exception even though there was no evidence in the record that the specific acts of negligence here directly flowed from policy choices of FAA employees. *Prescott*, 973 F.2d at 703.

The Ninth Circuit's narrow focus on safety was, and is, misplaced. The discretionary function exception does not apply where the claimed negligence "involved considerations of safety, not public policy." *Faber v. United States*, 56 F.3d 1122, 1125 (9th Cir. 1995). Everything the FAA does, from the lowest level employees to the agency administrator, is about aviation safety, which is its statutory mandate. This does not mean that discretion or public policy judgment is involved in every action taken by the agency.

In this case, a low level government employee decided not to install the video map, even though there was an order to do so. While the initial decision to implement the EOVM program in the 1970s was a policy decision, the failure to follow the EOVM regulations

involved no discretion and was not protected judgment. *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) (while initial decision to undertake maintenance of lighthouse was a discretionary judgment, the failure to maintain the lighthouse in good condition was not).

The challenged conduct here was in direct contravention of a specifically prescribed federal policy, so the discretionary exception is not implicated. If it is a choice that is to be exercised within established objective standards, and the plaintiff claims negligence in failure to follow such standards, the discretionary function exception does not apply. *Berkovitz*, 486 U.S. at 536.

This case of first impression resonates in that it will be cited by the United States to persuade other courts that "shall" does not mean "shall" and that rules may be ignored. This case presents the Court with another opportunity to speak on the reach of the discretionary function exception. It is urged to do so.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

(Any footnotes trail the end of each document.)

No. 00-55989, No. 00-56269

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YVONNE ELLEN, Personal Representative of the Estate of Lynette Franco, Dec'd,
Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA; FEDERAL AVIATION AGENCY,
Defendants - Appellees.

November 8, 2001, Argued and Submitted, Pasadena, California

February 22, 2002, Filed

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For FEDERAL AVIATION AGENCY, Defendant - Appellee (00-55989, 00-56269): Robert G. David, Jr., U.S. DEPARTMENT OF JUSTICE, Washington, DC.

JUDGES:
Before: HALL, KOZINSKI and W. FLETCHER, Circuit Judges.

OPINION:

MEMORANDUM *

Yvonne Ellen appeals the district court's grant of a motion to dismiss claims related to the non-installation of an Emergency Obstruction Video Map ("EOVM") as well as its judgment on her remaining tort claims relating to the actions of Air Traffic Control ("ATC") and the award of costs. Ellen sued the FAA under the Federal Tort Claims Act (the "FTCA") alleging negligence in connection with an air crash in which her daughter was killed. The district court dismissed all claims related to the EOVM, finding that the court lacked jurisdiction under the discretionary function exception to the FTCA. The district court also awarded judgment to the United States on the remaining issues, finding that no traffic controller had breached his duty of care. We affirm the district court as to each of these issues.

I. The EOVM

Ellen contends that the district court erred in holding that the discretionary function exception to the FTCA barred her claims regarding the FAA's failure to install an EOVM. [n1]

The applicability of the discretionary function exception to the FTCA's grant of jurisdiction is determined by a two part test. First, the exception only covers acts that are discretionary in nature. See Berkovitz v. United States, 486 U.S. 531, 536, 100 L. Ed. 2d 531, 108 S. Ct. 1954 (1988). This requirement is not satisfied where a "federal statute,

regulation, or policy specifically prescribes a course of action for an employee to follow." Id. However, "if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation." United States v. Gaubert, 499 U.S. 315, 324, 113 L. Ed. 2d 335, 111 S. Ct. 1267 (1991).

Second, if the challenged conduct does involve discretion, the court must determine whether it also involves a policy judgment. This second prong involves an objective test. The decision "need not actually be grounded in policy considerations, but must be, by its nature, susceptible to a policy analysis." Miller v. United States, 163 F.3d 591, 593 (9th Cir. 1998). Further, when a statute or regulation allows a federal employee to act with discretion, "it must be presumed that the agent's acts are grounded in policy when exercising that discretion." Gaubert, 499 U.S. at 324.

Ellen claims errors in regard to both prongs of the discretionary function test. She first argues that the district court erred because installation of an EOVM was a mandatory requirement of FAA Order 7210.3k. In the alternative, she argues that the decision not to install an EOVM was not a policy decision. We disagree.

The mandatory language in the first sentence of paragraph 103(a) is not applicable to facilities such as SoCAL TRACON that are using all of the channels on their video mappers. An EOVM is only required to be installed when a video channel is "available," a term defined by Webster's New Collegiate Dictionary as "present or ready for immediate use." Channels that are currently used for other maps are not ready for immediate use. Further, the language of paragraph 103(b) directly requires the use of discretion in determining how to deal with situations where all channels are in use. By implication, such discretion includes the discretion not to install an EOVM when doing so would be undesireable. There is nothing in the language of 7210.3k suggesting a requirement to install EOVMs in all cases where doing so is technically feasible.

The decision not to install an EOVM was also a policy decision. Safety is a quintessential policy issue. See United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) 467 U.S. 797, 81 L. Ed. 2d 660, 104 S. Ct. 2755 (1984); GATX/Airlog Co. v. United States, 234 F.3d 1089, 1096-1097 (9th Cir. 2000); Kennewick Irr. Dist. v. United States 880 F.2d 1018 (9th Cir. 1989); West v. FAA, 830 F.2d 1044, 1048 (9th Cir. 1987). The decision whether to install an EOVM required the FAA to balance the safety benefits of the information provided by the EOVM against both the safety and practical costs of eliminating another map or creating combined maps that could be cluttered and difficult to read. This is precisely the type of decision over which Congress intended to prevent judicial second guessing.

Ellen alternatively claims that, even if paragraphs 3-103(a) & (b) do not require installation of an EOVM, the latter at least requires consideration of all of the required alternatives. She thus suggests that the district court should have jurisdiction to determine if the failure to do so was negligence. We agree with the district court that such consideration did indeed occur.

II. Standard of Care

Ellen next contends that the District Court applied the wrong standard of care in assessing the conduct of Controller Rising. [n2]

Under the FTCA, the state law that would apply to determine the liability of "a private individual under like circumstances" determines the liability of the government. 28 U.S.C. § 2674. In airplane tort cases in California, "general negligence law applies; however 'the standard of due care is concurrent, resting upon both the airplane pilot and ground aviation personnel.'" Beech Aircraft Corp. v. United States, 51 F.3d 834, 838 (9th Cir. 1995) (quoting Spaulding v. United States, 455 F.2d 222, 226 (9th Cir. 1972)). An air traffic controller's conduct must also be measured against specific duties arising from the Government's assumption of certain functions or services. See Spaulding, 455 F.2d at 226. Such duties are described in part in the Air Traffic Control

Handbook (the "Handbook"), FAA Order 7110.65J, and include duties to warn of unsafe proximity to terrain and to assist in emergencies. See id.

However, while FAA documents may memorialize the functions assumed by that agency, breach of an internal agency manual such as the Handbook raises no automatic presumption of negligence under California law. By California statute, a breach of an existing duty of care is presumed when a person has "violated a statute, ordinance, or regulation of a public entity." Cal. Evid. Code § 669. However, § 669.1 of the California Evidence Code specifies that an internal agency document that is not formally enacted according to the procedures of the Administrative Procedure Act does not qualify as a "statute, ordinance, or regulation" of that agency. See also Management Activities, Inc. v. United States, 21 F. Supp. 2d 1157, 1176 (C.D. Cal 1998); McDaniel v. Sunset Manor Co., 220 Cal.App.3d 1, 5-6, 269 Cal. Rptr. 196 (1990); cf Posey v. State of California, 180 Cal.App.3d 836, 849, 225 Cal. Rptr. 830 (1986). Thus, while the language of several cases may suggest that air traffic controllers are required to comply with the terms of the Handbook, see Spaulding, 455 F.2d at 226; Armstrong v. United States, 756 F.2d 1407, 1409 (9th Cir. 1985), for the purposes of tort liability, the Handbook merely provides evidence of the services the FAA assumes and of the ATC practices.

The district court applied the correct standards. Ellen's contention that the district court failed to acknowledge the concurrent duties of pilots and controllers is without merit. While the district court did not specifically discuss the concurrence of pilots' and controllers' duties, it had no need to do so. It held the air traffic controllers to a duty of care in protecting the safety of N738ED to the extent that such safety was dependent on performance of their functions.

Likewise, Ellen's claim that the district court failed to recognize that Rising was required to issue low altitude warnings when the pilot already knew he was below the safe altitude also misapprehends the holding of the district court. The court did recognize a duty to provide reasonable warnings based on the FAA's assumed functions, but found

that Rising had satisfied it. If this claim is that the district court applied the wrong standard in failing to hold that failure to give low altitude warnings in the language specified in the Handbook is negligence per se, it is foreclosed by Cal. Evid. Code § 669.1. [n3]

Ellen's third claim is that the district court applied the wrong standard by failing to recognize that a controller is required to take specific actions in an emergency–namely, to inform a pilot of his options, to again give low altitude alerts using the specified language, to avoid any actions that increase a pilot's workload, and to hand-off other airplanes to coworkers. While these actions all find some supporting language in the Handbook or in case law, See e.g., Daley v. United States 792 F.2d 1081, 1085 (11th Cir. 1986); Worthington v. United States 21 F.3d 399, 403 (11th Cir. 1994), they are all simply applications of the reasonableness standard to emergency circumstances. The standard remains reasonableness, while its application varies in light of the increased danger and a controller's duty to render maximal assistance in emergencies. See Daley, 792 F.2d at 1085; see also, Thurston v. United States, 888 F. Supp 1100, 1110 (D. Utah 1995). The district court applied the correct standard.

III. Issues of Fact

Having found that the District Court articulated the correct standards, we also find that it applied those standards to the facts of the case without committing clear error.

IV. Exclusion of the Radar Plot

Ellen argues that the district court erred by excluding a radar plot of the plane's flight path from evidence and precluding appellant from cross-examining the government's pilot expert, Sparky Imeson, with respect to the plot.

The court's refusal to enter the plot in evidence was not an abuse of discretion. Ellen points to nothing in the record showing that counsel laid a proper foundation for the plot's admission. Ellen's argument that the document is an

admission against interest is not apposite to the issue of foundation.

Neither did the court abuse its discretion by limiting cross-examination on the chart. This court has said that "the scope and extent of cross-examination of expert witnesses rests in the sound discretion of the trial court and 'is not subject to exception unless wholly arbitrary, unreasonable and abusive, and the examination need not be extended to permit interrogation about collateral, immaterial or irrelevant matters.'" United States v. 10.48 Acres of Land, 621 F.2d 338, 340 (9th Cir. 1980) (quoting United States v. 25.02 Acres of Land, Douglas County, Colo., 495 F.2d 1398, 1402 (10th Cir. 1974)). Imeson stated that he reviewed the map, but did not rely on it or discuss it with the expert from whom he received it. When questioned about the map at trial, he stated that he did not know what the red dots on the map represented. Thus, while the trial court had latitude to permit counsel to cross-examine Imeson as to how he might interpret the map if he assumed the dots represented the flight-path of the plane, it also had discretion to foreclose this path as immaterial.

V. Post-Trial Motions

Ellen contends that the district court's judgment was based on knowingly false testimony presented by the United States on the last day of trial. Ellen's complaint is that Rising's testimony that he was generally aware of a saddle between Julian and Mt. Cuyamaca must have been fabricated because it was not mentioned in his deposition. We reject this argument. Though Rising did not directly discuss a "saddle" in his deposition, he did evince awareness of this fact. ER at 73. The court did not, contrary to Ellen's argument, assume that Rising could see the terrain or its position relative to the airplane on his radar maps. The court's conclusion that Rising was trying to direct him to the west and through an area where he knew there to be a saddle was based on Rising's testimony that he knew the plane to be near Julian and that he knew the general terrain of the area. The court did not abuse its discretion in refusing to set aside the judgment.

Nor did the district court abuse its discretion in refusing to set aside costs. Under the Federal Rules of Civil Procedure, "costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs...." Fed. R. Civ. P. 54(d). Rule 54(d) creates a presumption in favor of awarding costs. See Ass'n of Mexican-American Educators v. Cal., 231 F.3d 572, 592 (9th Cir. 2000) (en banc). This presumption may be overcome by a showing of misconduct or other factors that make a case "extraordinary" and the awarding of costs "inappropriate or inequitable." Id. Ellen has made no such showing.

For the foregoing reasons, the district court's rulings are AFFIRMED.

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

n1 We note in passing that Ellen has not stated on appeal the basis for her contention that the FTCA would grant jurisdiction over her EOVM claim if it were not barred by the discretionary function exception. At times, her FTCA claim appears to read as if based on a negligence per se theory that would bootstrap liability on violation of a federal statute. Such an approach would fail to state a claim under the FTCA: "To bring suit under the FTCA based on negligence per se, a duty must be identified, and this duty cannot spring from a federal law. The duty must arise from state statutory or decisional law, and must impose on the defendants a duty to refrain from committing the sort of wrong alleged . . . ." Delta Savings Bank v. United States, 265 F.3d 1017, 1026 (9th Cir. 2001) (citations omitted). However, we need not long be detained by this issue. As with her other FTCA claims the appropriate state law duty may be found in "the simple tort principle that once the Government has assumed a function or service, it is liable for negligent performance." Spaulding v. United States, 455 F.2d 222, 226 (9th Cir. 1972). The FAA and its personnel have a assumed a function to perform an

emergency assistance service and the decision whether or not to install an EOVM falls within the scope of that duty.

n2 We again note that Ellen's appeal at times reads as if to allege violations of duties springing directly out of federal law. As noted above, such a theory does not state a claim under the FTCA, and we thus read her claim as based on the general duty of care as applied to the functions assumed by the FAA.

n3 Ellen points to the case of Rodriguez v. United States 823 F.2d 735 (3rd Cir. 1987) as support for the principle that failure to use the terminology specified in the Handbook constitutes negligence. That case is distinguishable however, because the air traffic controller at issue was giving a first warning and the language he used was insufficiently urgent to accurately convey the danger faced by the pilot. Id. at 741. Thus, the behavior in Rodriguez constituted a breach of the standard as correctly formulated.

CASE NO. 98-CV-0273-K (POR)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

YVONNE ELLEN, Personal Representative of the Estate of Lynette Franco, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Federal Aviation Administration,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT AND/OR FOR A NEW TRIAL

On March 31, 2000, Plaintiff Yvonne Ellen filed a motion to set aside the court's judgment in this case and/or for a new trial. The parties were informed that the court would grant Defendant's request to file an untimely opposition, which is herein granted. The opposition was filed on May 1, 2000, and the court gave Plaintiff until May 8, 2000 to file a reply.

I. Background

The action, filed pursuant to the Federal Tort Claims Act ("FTCA") on February 11, 1998, arose from a small aircraft accident that occurred on February 19, 1996, killing Lynette Franco and two others. Plaintiff is the personal representative of Lynette Franco. Plaintiff sued Defendant for the alleged negligence of several of Defendant's employees. . The allegations of negligence fall into two broad categories: (1) failure to give adequate weather forecasts and briefings; and (2) failure of Air Traffic Control personnel at L.A. Center and SOCAL TRACON to adequately warn the pilot of altitude dangers at several points and failure to adequately assist him out of his emergency.

On January 25, 2000, the bench trial in this action began. The court, after rendering oral findings of fact and conclusions of law, awarded judgment to Defendant on February 3, 2000, finding that Plaintiff had failed to prove that any employee of Defendant was negligent. On March 17, 2000, judgment was entered for Defendant, incorporating the court's findings of fact and law as stated in open court on February 3, 2000.

On March 3 1, 2000, Plaintiff filed the instant motion, setting forth several arguments for setting aside judgment and/or for a new trial. Plaintiff argues that the court committed manifest errors of both fact and law prejudicial to Plaintiff. Plaintiff also argues that the court committed reversible legal error prejudicial to Plaintiff and/or abused its discretion in its evidentiary rulings excluding evidence of a plot prepared by the United States Air Force and supplied by defense counsel to the defense experts, and compounded its error by refusing to allow Plaintiff to cross-examine one of the defense witnesses concerning this data, notwithstanding the witness' actual review of the document. In addition, Plaintiff argues that the court's factual findings are based upon knowingly false testimony by a defense witness adduced on the last day of trial, which Plaintiff had no opportunity to address. Finally, Plaintiff challenges as reversible error the court's conduct of the proceedings, in particular the limitation of the cross-examination of defense witnesses until after the defense's case-in-chief.

II. Discussion

A. Legal Standard

Plaintiff moves pursuant to Fed R. Civ. P. 59(a)(2). Rule 59(a)(2) states: "A new trial may be granted to all or any of the parties and on all or part of the issues. a • in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts ofthe United States." Fed R. Civ. P. 59(a)(2). The Ninth Circuit has held: "There are three grounds for granting

new trials in court-tried actions under Rule 59(a)(2): (1) error of law; (2) manifest error of facts; and (3) newly discovered evidence." Brown v. Wright, 588 F.2d 708, 710 (9th Cir. 1978) (citing 6A Moore's Federal Practice ¶ 59.07 at 59-94). Rule 59(b) provides that a motion for a new trial shall be filed no later than 10 days after entry of the judgment. Plaintiff's Rule 59 motion for a new trial, filed on March 31, 2000, was timely because it was filed within 10 days of entry of judgment, excluding weekends as provided by Fed. R. Civ. P. 6(a).

B. Errors of Fact

Plaintiff argues that the court made several factual findings that are not based upon or that misapprehend evidence in the record. Plaintiff's tendency to hack off snippets of the court's findings of fact and conclusions of law and take them out of context is frustrating and misleading. The court will discuss the alleged errors of fact as Plaintiff states them, although Plaintiff's presentation of the factual findings is often misleading.

> 1. Court's finding that Matiz "did not turn the plane to correspond to the 240 and 270 degree vectors but rather, briefly continued on his 360 degree heading," Exh. 1fn1 at 3; Court's finding that "the pilot did not change his headings," Exit 1 at 24.

Plaintiff challenges the court's finding that Matiz "did not turn the plane to correspond to the 240 and 270 degree vectors, but rather, briefly continued on his 360 degree heading before he crashed at 5,430 feet, some 70 feet, approximately, from the ridge line on the 360 degree heading he was flying." Exit. 1 at 3. Plaintiff argues that there was no testimony that Matiz flew a 360 degree heading, only that the flight path of the plane was 360 degrees. As Defendant points out in its opposition, the court used "heading" in these contexts to describe the flight path of the aircraft. In finding that "the pilot did not change his headings," Exh. 1 at 24, the court credited the testimony of Sparky Imeson that the pilot

never turned to the 240 degree heading and that the plane continued on its 360 degree track. See N.T. 6-23-6-26. The court found Imeson's testimony that Matiz did not respond to Rising's last commands compelling, and found that: "Rather than turn for a 240 or 270 vector, he remained on the 360 heading." Exh. 1 at 24. Although "heading" has a technical meaning, i.e., where the pilot points the aircraft's nose in accordance with the directions from air traffic control in response to a vector, see N.T. 6-193, the court' use of "heading: to describe the flight path is clear from the context.

> 2. Court's conclusion that "there's been some discussion about – at various points in the testmony of this trial about the doctrine of whether functional equivalents can apply to satisfy a duty, whether that is a violation – and it appears to be a technical violation of the manual at that point. I think that there's no question but that what is going on is he's being alerted in as plain of terms as can be - 'I'm worried that you're going to run into a mountain' – about the altitude of the plane." Exh. 1 at 15.

Plaintiff's argument here is hard to follow. Plaintiff argues that controller Rising did not know where the terrain was and did not communicate his ignorance to the pilot, and gave Matiz a vector into the only terrain Rising knew was higher, in violation of his duty. Plaintiff's argument does not seem to respond to the conclusion she challenges. In connection with the above quoted language, the court found that Rising's statement was the functional equivalent of a low altitude alert and satisfied his duty to give a low altitude alert See Exh. 1 at 16. The court's finding here relates to Rising's duty to give low altitude alerts, not any other duty he might have had to assist Matiz. Moreover, although Rising did not know precisely "where the terrain was," he did know there was a saddle through the mountains in this area, and he directed Matiz toward it. Matiz, however, did not alter his flight path.

> 3. Court's pointing out that Matiz said, "Luckily we are still VSR [sic]," suggesting that Matiz was visually able to see what was going on. Exh. 1 at 15.

Plaintiff argues that the court's suggestion that Matiz could see the terrain is not supported by the record. Defendant responds that the record supports the finding that the pilot was in visual flight rules (VFR) conditions, and able to see what was going on around him. At the point when Matiz indicated that he was still operating under VFR conditions, there is no reason to think that he was not. Matiz was a flight instructor who knew what "VFR" meant. Hence, there is no reason to suggest that he could not see when he said he could. Although a later communication from Matiz indicated that he could no longer see the ground, see N.T. 6-81, the court simply relied on the veracity of the pilot's statement about being VFR at the point when he said it. That is, the court applied that statement, and the conclusion that Matiz could see what was going on, to the situation in which it was made. Plaintiff has not demonstrated error.

> 4. Court's conclusion that "In fact, there's just no evidence that had, in fact, the pilot complied with those commands that the altitude that Rising was pointing him towards would have been unsafe." Exh. 1 at 22.

Plaintiff argues that the terrain to which Rising's vectors were given were to higher terrain, and "could, would, and did result in the impact with higher terrain." Plaintiff's Memo at 7. Plaintiff's argument does not contradict the court's finding, which was that if Matiz had, complied with Rising's vectors, the altitude would not have been unsafe. The court relied on the testimony of Sparky Imeson that had Matiz complied with the vectors given by Rising which were to the west and southwest, Matiz would have cleared the terrain. See N.T. 6-26, 6-28. The court also relied on the

testimony of Plaintiff's expert, Robert Cauble, that when Matiz requests vectors, the 8000 MVA was to the north, south, and east of the aircraft, and the 7000 MVA was to the west and southwest. See N.T. 2-85. Plaintiff's argument is unavailing.

> 5. Court's conclusion that giving Matiz a "lifeline" by giving him vectors, was not shown to be a "frivolous idea, a dumb idea, a stupid idea, or an incorrect idea." Exit. 1 at 23.

Plaintiff argues that the vectors given, which Matiz had to fly, were to higher terrain, not lower terrain, and that Rising then abandoned Matiz, telling him to navigate on his own. This argument seems similar, if not identical, to the previous argument. Defendant points to the testimony of Plaintiff's expert, Robert Cauble, that the 240 and 260 headings provided by controller Rising were to the west and southwest and put the aircraft in a lower MVA. See N.T. 245, 296. As stated above, the court also looked to Sparky Imenson's testimony that compliance with the vectors given would have resulted in the aircraft clearing the terrain. See N.T. 6-26, 6-28. The court found from the evidence that had Matiz complied with the vectors given, he would have cleared the ridge that he unfortunately crashed into. The court's finding that the idea was not frivolous, dumb, stupid, or incorrect stands.

C. Errors of Law

Plaintiff challenges several conclusions of law, which the court will discuss in turn.

> 1. Court's conclusion that controller Schiring, at Center, had no duty to keep the aircraft rather than handing off to TRACON. See Exh. 1 at 12.

Plaintiff argues that the controller had a duty to monitor aircraft in the vicinity. Plaintiff, however, points to no law that suggests that a controller should continue to keep on his frequency an aircraft that is not in an emergency and that is entering another airspace. The aircraft was entering SOCAL TRACON's airspace, which Rising was more familiar with, and before handing off, Schiring alerted Rising that the aircraft had been given a low altitude alert. See Exh. 1 at 12. The court reiterates that Schiring breached no duty by handing the aircraft off to Rising at SOCAL TRACON.

2. Low altitude alerts

> a. Court's conclusion that there was no duty to give low altitude alerts when "Matiz knows that's where he's supposed to be." Exh. 1 at 14.

First, Plaintiff misstates the court's conclusion. The court did not conclude that Matiz's knowing what he is supposed to be Obviated the duty to give a low altitude alert. The court concluded that Matiz knew where he was supposed to be on the basis of an exchange between Rising and Matiz in which Rising asked if Matiz could maintain 8,000 feet, and Matiz responded that he could not at that point but could in five minutes. Rising then stated: "There are no other airplanes in the area. I am not worried about collision. I just want to make sure that you are high enough over the mountains." Matiz responded: "Okay, sir. Luckily, we are still VSR [sic]." The court concluded that this exchange, which evidenced concern on the part of the controller, and comprehension on the part of the pilot, was the functional equivalent of a low altitude al ert . It indicated that Matiz was aware he was low, and what the danger is – mountains.

> b. Court's conclusion that there was no violation of the duty to give low altitude alerts because Rising gave the "functional equivalent" of "this is a low altitude alert" Exh. 1 at 16.

Plaintiff argues that the controller's advisory was not in conformity with the FAA handbook and was insufficient to convey to Matiz the need for immediate action. See Rodriguez v. United States, 823 F.2d 735, 740-41 (3d Cir. 1987). Plaintiff quotes the Aeronautical Information Manual in asserting that government employees did not comply with its requirements. Although the manual provides that "good phraseology enhances safety," the manual also provides that "the single, most important thought in pilot-controller communications is understanding" Plaintiff's Reply at 3. In this case, the court found that Matiz was alerted to the danger of running into a mountain, that Matiz acknowledged that concern, and that Matiz stated that he was still operating under visual flight rules at that time. The facts in this case permit the court to conclude that Rising's exchange with Matiz was the functional equivalent of a low altitude alert. The court found this was particularly true since a few minutes eailier, Matiz was given a "textbook" low altitude alert by Center (Los Angeles). The conversation with Matiz about the mountains was not in isolation, but part of a continuum of conversations about his altitude.

> c. Court's conclusion that even if failure to say "low altitude alert" is a technical violation of the Handbook, there was no causation. See Exh. 1 at 19.

Plaintiff argues that the Handbook is designed to prevent collisions of aircraft with terrain; where a controller does not comply with the Handbook and an aircraft strikes higher terrain, causation must exist. The court concluded that although Rising did not issue a low altitude alert in the words set forth in the Handbook, he conveyed the equivalent of a low altitude alert to Matiz. Matiz clearly realized that he was experiencing problems maintaining altitude and that there was a danger of high terrain. Even if Rising breached his duty by not uttering the specific words set forth in the Handbook, no causation exists because the words, "low altitude alert,"

would not have provided Matiz with any greater advisory of peril than he received and the conversations demonstrate he perceived. The court finds no error of law.

> 3. Court's conclusion that the "block altitude" Rising gave did not violate his duty because the aircraft was "on the cusp of' the minimum vectoring altitude. See Exit 1 at 17.

Plaintiff argues that minimum means minimum and the lack of conformity to FAA requirements breached a duty. Plaintiff fails to note that the court found by a preponderance of evidence that at the time the block altitude was given, the aircraft was at a 7,000 MVA. What the court said was: "But even if he was not clearly in the 7,000 foot MVA, which I find by a preponderance he was, he at best was - mean, at best from Plaintiff's standpoint – was on the cusp of it." Exit 1 at 17. The court's language does not indicate that the aircraft was below the minimum vectoring altitude of 7,000; "cusp" refers simply to the fact that the aircraft was at "the beginning" of the MVA of 7,000. See Webster's Third New Int'l Dictionary. Plaintiff has given the court no reason to revisit its conclusion that Rising's giving Matiz a block altitude of 7,000 was not a violation of Rising's duty.

> 4. Court's conclusion that Rising did not violate any duty once Matiz declared an emergency because "the pilot was clearly aware he was in low altitude" and "knew what was east and west and north and south far better than anyone else because he flew here all the time." Exh 1 at 19, 23.

Again, Plaintiff misstates the court's conclusion. The court found that Rising did not breach his duty by giving Matiz the vectors in response to Matiz's request for "vectors out of here". Plaintiff argues that when a pilot is in distress, the controller' s failure to inform the pilot of his options and respond to his need for assistance is a cause of the pilot's failure to land safely, even if the pilot is concurrently

negligent. The case cited for this proposition, Spaulding v. United States, 455 F.2d 222, 226 (9th Cir. 1976) does not seem to support this assertion. In fact, the Spaulding court concluded that in the emergency situation, "Austin approach controller gave instructions to the pilot which could be reasonably and safely accomplished and which were reasonably calculated to provide assistance to the pilot" Id. Plaintiff also argues that in certain situations, controllers must give warnings that go beyond the manuals. Id. at 226. The court here found that Rising took steps to respond to Matiz's request for assistance by providing him with vectors, which had they been followed, would have enabled the aircraft to clear the ridge it crashed into. The court's conclusion that Rising violated no duty in giving Matiz vectors stands.

D. Evidentiary Rulings

Plaintiff argues that the court committed prejudicial error by excluding a radar plot of the plane's flight path evidence and precluding Plaintiff from cross-examining Defendant's pilot expert, Sparky Imeson, with respect to the plot. Plaintiff argues that the plot was prepared by the United States Air Force at the Justice Department's request and provided by defense counsel to defense experts. Defendants respond that the document was not in evidence and was given to Imeson by an expert with whom he did not discuss it. Defendant argues that Imeson did not prepare, discuss, or rely on the document.

Plaintiff argues that the plot should have been admitted as an admission that directly contradicted the Defendant's position at trial See S. Leo Harmonay, Inc. v. Binks Manufacturing Co., 597 F.Supp. 1014, 1022 (S.D.N.Y. 1984) (bar charts prepared by defendant admissible as party admissions). In this case, Plaintiff points to nothing in the record to show that counsel laid a proper foundation for admission of this document into evidence. The state of the record at the time Plaintiff sought to introduce it was the testimony of Sparky Imeson, who testified that he did not rely

on the document. Plaintiff did not lay any foundation, nor argue that it was an admission. Accordingly, the court's refusal to admit it was not error.

With respect to cross-examining Defendant's expert about the plot, Imeson stated that he reviewed the map, but that he did not rely it. See N.T. 6-169. When questioned about the map at trial, before such questioning was halted, he indicated that he did not know what the red dots on the map represented. Id. Plaintiff cites several cases in which the district court was not reversed for permitting cross-examination regarding documents reviewed by experts. Finding no abuse of discretion in permitting such cross-examination is a far cry from requiring such cross-examination when the witness says he does not know what it means and that he did not rely on it. The court made no error in preventing Plaintiff from cross-examining him about the map.

E. False Testimony

Plaintiff argues that the court should reverse her judgment because the court's findings are based on knowingly false testimony and are unsupported by the uncontroverted record. Plaintiff points first to controller (Greg Rising's testimony regarding his knowledge that there was a saddle in the mountain when he was giving Matiz vectors as "a defense creation concocted at the close of trial". Plaintiff's Memo at 20. Plaintiff also challenges Defendant's objection during the cross-examination of defense witness Joseph Beaudoin, in which defense counsel stated: "There is no MSAW warning in the TRACON." Plaintiff's Memo at 22 (quoting N.T. 7-30). Defendant does not respond to this argument.

The court did not, contrary to Plaintiff's argument, assume that controller Rising could see the terrain vis-a-vis

the aircraft on his scope. The court's conclusion that Rising "was trying to put him on a southwest or west-west, but not northwest, heading to get him out of there in an area where he knew that there was a saddle in the mountain peaks" was not based on a presumption that Rising could see the terrain on the equipment he was using, but on Rising's testimony that he had some idea where the plane was, that is, almost past Julian, and that he was familiar with the general terrain of the area because he drove past it frequently. N.T. 7-22; N.T. 6-76. Rising made quite clear to the court that he did not know for sure what the exact contours of the terrain were. See N.T. 6-76. Plaintiff-points to Rising's deposition testimony, during which a saddle was not mentioned, to show that Rising made the saddle up. Plaintiff has not given the court a substantial reason to believe that Rising's testimony was fabricated. In addition, the court did not rely solely on Rising's testimony about the saddle in concluding that Rising did not err in providing Maiz with the vectors that he did. The court took into account the minimum vectoring altitudes (MVA) to the north, south, east, and west, in concluding that Rising's vectoring was not faulty. See Exh. 1 at 22.

Plaintiff's challenge to defense counsel's objection regarding the existence of an MSAW alert at TRACON is meritless. The court made clear at the time of that objection that she understood that such an alert had gone off and that Mr. Rising simply did not know when. The existence of the alert was not a question in the court's mind.

Plaintiff raises Rule 60(b) as an additional ground for her motion in challenging the "saddle testimony." Plaintiff argues that Rule 60(b) confers jurisdiction on a court where an injured party is prevented, by fraud or deception, from presenting his claim or defenses or introducing relevant or material evidence. See Luttrell v. United 644 F.2d 1274, 1276 (9th Cir. 1980). Rule 60(b) permits reconsideration only upon a showing of (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud or misconduct; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) any other reason justifying relief from the

operation of the judgment. See Fed. R. Civ. P. 60(b). Plaintiff argues that the "eleventh hour manufacture of the alleged saddle was a completed [sic] surprise," presumably urging the court to reconsider its judgment pursuant to Rule 60(b)(1). Although Plaintiff cites no cases that address surprise, the court finds that the applicable case law supports denying a motion for reconsideration based on surprise where the moving party did not object to the testimony or request a continuance, sidebar, or limiting instructions. See Newell Puerto Rico, Ltd. v. Rubbermaid Inc., 20 F.3d 15 (1st Cir. 1994); Sadowski v. Bombardier Ltd., 539 F.2d 615 (7th Cir. 1976). Plaintiff here took none of those actions. The court denies Plaintiff's motion for reconsideration insofar as it is made pursuant to Rule 60(b)(1).

To the extent that Plaintiff is moving for reconsideration pursuant to Rule 60(b)(3) on the ground of fraud, misrepresentation, or other misconduct by Defendant, arguing that Rising's testimony was fabricated and defense counsel was misstating facts in an objection, the motion is denied. First, the court is not in the least persuaded that Rising's testimony was fabricated. Plaintiff made no effort to poke holes in Rising's testimony about the saddle during cross-examination. Second, Rising's testimony that he believed there to be a saddle in the direction he was vectoring the plane was not the only evidence the court relied upon in concluding that Rising was not negligent. The testimony of Imeson that had Matiz complied with the vectors, he would have cleared the ridge was persuasive.

Plaintiff also argues that defense counsel's objection regarding the existence of an M S AW alert at TRACON was false. The court concludes that one objection by defense counsel that misstated a fact, after which the court made clear that it did not adopt Defendant's position, does not constitute fraud or misrepresentation on the part of Defendant. The record does not support a finding of fraud or misrepresentation justifying the extraordinary remedy of setting aside a judgment.

In her reply, Plaintiff appears to be moving for reconsideration pursuant to Rule 60(b)(2) on the grounds that "the saddle" is newly discovered evidence. To succeed on a motion under Rule 60(b)(2) for relief from judgment based upon newly discovered evidence, "the movant must show the evidence (1) existed at the time of the trial, (2) could not have been discovered through due diligence, and (3) was 'of such magnitude that production of it earlier would have been likely to change the disposition of the case." 921 F.2d 875, 878 (9th Cir. 1990) (quoting Coastal Transfer Co. V. Toyota Motor Sales, U.S.A., 833 F.2d 208, 21 1 (9th Cir. 1987)). However, Plaintiff's own argument belies the appropriateness of the court's granting such relief. If in fact this evidence was "new" at trial, it was "discovered" by Plaintiff at trial. Plaintiff made no objection to nor went on the record about this new evidence. This evidence was not "newly discovered" within the meaning of Rule 60(b)(2), and does not justify the court setting aside its judgment.

F. Conduct of Proceedings

Plaintiff argues that the court's use of time limits, "sprung on plaintiff's counsel on the morning of the last day of trial, " prejudiced Plaintiff. Plaintiff's Memo at 24. . Plaintiff points to the court's deferring Plaintiff's cross-examination of defense witnesses as particularly problematic. Plaintiff's argument that he was ambushed by the time limits is disingenuous, to say the least, and totally contrary to the record. At the November 22, 1999 pre-trial conference, the court stated: "You think it can be done in five days. What I'll do is I'm going to give each side 13 hours . . a u Once you start to talk, the time goes." Nov. 22, 1999 Transcript at 19-20. On January 13, 2000, during the hearing on the parties' motions in limine the court stated: "I've given you both time limits. You know what your time limits are. And they will be strictly enforced and, therefore, people will have to be judicious on how they want to use their time." Jan. 13, 2000 Transcript at 17. Hence, Plaintiff's counsel himself later clarified, "And it's thirteen hours per side?" to which the court replied, "Correct." Id. at 23. Plaintiff's counsel was well

aware of the time limits before the trial even began.

With respect to the court's deferring Plaintiff's cross examination of defense witnesses, Plaintiff had no time remaining in her thirteen hours by the last day of trial, whereas Defendant had used only nine. N.T. 6-3. In spite of Plaintiff's having already exhausted her time, however, the court still granted Plaintiff time to cross examine Defendant's witnesses. The court stated: "I'm going to let her put on her witnesses, and you'll have all the rest of the time today to cross." N.T. 6-4. At several points throughout the trial, the court reminded Plaintiff's counsel that he was exhausting his time and expressed concern he was doing so. The court's clerk kept an ongoing table of time used, and on his own and at the court's urging, Plaintiff's counsel checked it. The court cleared its calendar an extra day and one half to give the parties more time. Because Plaintiff's counsel had exhausted his time and Defendant had only used nine hours, the court ordered that the only fair way to insure defense counsel had time to present their case was for Defendant to put on its remaining witnesses and then if any time was left, Plaintiff's counsel could use it to cross-examine those witnesses, which he did.

This court wishes it could give civil cases unlimited time. Due to incredible docket pressures, it cannot. However, the point is, in their pre-trial order, the parties said they needed five days, and the court gave them six, plus a half day for argument. The time pressures were clear before and during the trial. Criminal matters were postponed to accommodate counsel. The time was Plaintiff's to spend wisely or squander. Plaintiff's contention that she was unfairly prejudiced by the proceedings is unavailing.

III. Conclusion

Accordingly, the court DENIES Plaintiff's motion to set aside judgment and/or for a new trial.

IT IS SO ORDERED.

Date May 10, 2000

Footnotes

fn1 Exhibit 1 is the court's findings of fact and conclusions of law, rendered on February 3, 2000.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

YVONNE ELLEN, Personal Representative of the Estate of Lynette Franco, Deceased, 9133 Gold Road Queens, NY 11417 Plaintiff,	)	
v.	)	CASE NO: 98-cv-0273K (POR)
UNITED STATES OF AMERICA Federal Aviation Administration, 800 Independence Avenue, S.W. Suite 912, AGC-400 Washington, D.C. 20591 Defendant.	)	**ORDER**

WHEREAS, the above-captioned matter was tried before the Court, without a jury, pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1). The trial began on January 25, 2000 and ended following closing arguments on February 3, 2000. Plaintiff Yvonne Ellen was represented by Richard E. Genter; Defendant United States of America was represented by Colleen L. Conlin, Robert G. David and Catherine M. Maraist.

ENTERED ON 3/17/00

IT IS HEREBY ORDERED that after hearing the witnesses presented and considering all the evidence and the arguments of counsel and the law, the Court finds that no federal employee has been proven to be negligent, and thus judgment is awarded to the defendant United States of America, as well as costs of suit, for the reasons set forth in the Court's oral findings and rulings announced in open court on February 3, 2000, which are incorporated herein by reference.

/s/ Judith N. Keep
JUDGE JUDITH N. KEEP

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAY 07 2002

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

YVONNE ELLEN, Personal Representative of the Estate of Lynette Franco, Dec'd,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; FEDERAL AVIATION AGENCY,

Defendants - Appellees.

No. 00-55989

DC No. CV-98-00273-JNK(LSP)

YVONNE ELLEN, Personal Representative of the Estate of Lynette Franco, Dec'd,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; FEDERAL AVIATION AGENCY,

Defendants - Appellees.

No. 00-56269

DC No. CV-98-00273-JNK(LSP)

ORDER

BEFORE: HALL, KOZINSKI, and W. FLETCHER, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judges Kozinski and Fletcher have voted to reject the petition for rehearing en banc and Judge Hall recommends rejection. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

STATUTE INVOLVED

28 U.S.C. § 2680 provides:

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officers, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if –

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of

property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of the assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the

United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsections, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.